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IN THE SUPERIOR COURT

STATE OF ARIZONA, COUNTY OF YAVAPAI

STATE OF ARIZONA, Plaintiff, vs. JAMES ARTHUR RAY, Defendant.	**V1300CR201080049** **STATE'S RESPONSE TO DEFENDANT'S MOTION TO COMPEL DISCLOSURE OF BRADY MATERIAL** **Division PTB**

The State of Arizona, by and through Sheila Polk, Yavapai County Attorney, respectfully files this response to Defendant's Motion to Compel Disclosure of Brady Materials. As explained in the following Memorandum of Points and Authorities, the cases cited by Defendant in support of the premise that the State has the obligation to seek exculpatory information from persons or agencies outside the State's control do not support Defendant's Motion.

MEMORANDUM OF POINTS AND AUTHORITIES

I. The Facts

1.) On October 8, 2009, Kirby Brown and James Shore passed away while participating in Defendant's sweat lodge ceremony. Ten days later, Lizbeth Neuman also passed away.

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2.) After a four month investigation, the case was presented to a Yavapai County Grand Jury and Defendant was indicted on three counts of manslaughter.

3.) Through media reports and in talking to certain family representatives, the State learned that some lawsuits or demands had been filed against Defendant, James Ray International, the Hamiltons and Angel Valley Spiritual Retreat Center. The State never obtained copies of the lawsuits or demands. The State has since learned that lawsuits and claims were filed by ten participants against Defendant, James Ray International, the Hamiltons, Angel Valley Spiritual Retreat Center and other entities. *See Exhibit A*. The State has also learned that the Hamiltons and Angel Valley Spiritual Retreat Center were sued by Ivan Lewis, Floyd Hand, William J. Bielecki, Sr., Jimmie Packhorse, Sr., and others. This lawsuit has been dismissed.

4.) In arranging the defense interview of Stephen Ray, the State learned Mr. Ray had an attorney and arranged the interview through him. During the defense interview, the State learned that the Defendant had settled the claim filed by Stephen Ray and that a confidentiality agreement existed. Stephen Ray declined to provide any information to the parties about his lawsuit. The State respected that position and did not inquire further.

5.) The State was aware that participants Sidney Spencer and Dennis Mehravar had filed lawsuits against Defendant and others, and had received expert witness reports pertaining to their civil case; these expert witness reports were disclosed to Defendant on November 23, 2010 in the State's 19th Supplemental Disclosure.

6.) On information and belief, Defendant, as a party to the lawsuit, was served in accordance with the law with the lawsuits and claims prior to commencement of this trial.

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7.) On December 17, 2010, the State met with defense attorneys Luis Li and Tom Kelly at their request. During that meeting, Mr. Li told the State that the Defendant had settled the claims with the families of the three victims.

8.) To the State's knowledge, the Hamiltons and Angel Valley Spiritual Retreat Center have not settled the lawsuits.

9.) On March 10, 2011, Mr. Li attempted to use a civil complaint filed by Dennis Mehravar in examining this witness. When the State objected, Mr. Li withdrew his line of questioning. The next morning prior to Court, Mr. Li told the State he would not use the lawsuits until the issue had been briefed with the Court.

10.) On March 22, 2011, Mr. Li then used a lawsuit filed by witness Laurie Gennari in his cross examination of this witness. The State had no prior knowledge of the lawsuit filed by Ms. Gennari until it was presented by Mr. Li in court on March 22, 2011. This lawsuit was apparently filed in a California court in September of 2010, three months before the State's meeting with Mr. Li. According to avowals made by Mr. Li on March 22, 2011, this lawsuit has not been settled.

II. The Law

A. State's Disclosure Obligation Under *Brady v. Maryland*

Because the defense has a due process right to a fair trial, the prosecution has an affirmative duty to disclose material exculpatory evidence to the defense. *Brady v. Maryland,* 373 U.S. 83, 87, 83 S.Ct. 1194, 1196-1197 (1963). This includes all evidence that could be used to impeach a prosecution witness. *United States v. Bagley,* 473 U.S. 667, 676, 105 S.Ct. 3375, 3380 (1985). Rule 15.1(b)(8), Ariz. R. Crim. codifies the State's duties under *Brady* and requires the State to disclose "[a]ny then existing materials or information which tends to

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mitigate or negate the defendant's guilt as to the offense charged, or which would tend to reduce the defendant's punishment therefore."

The State's obligation to disclose under Rule 15.1 extends to the material and information in the possession or control of any law enforcement agency or any other person who has participated in the investigation or evaluation of the case and that is ***under the prosecutor's direction or control.*** Rule 15.1(f), Ariz. R. Crim. P., (emphasis added). The State is deemed responsible for obtaining and disclosing material and information held by state, county, and municipal law enforcement agencies that have participated in the investigation of the case. *See Carpenter v. Superior Court,* 176 Ariz. 486, 489-490, 862 P.2d 246, 249-250 (App. 1993) ("[A] law enforcement agency investigating a criminal action operates as an arm of the prosecutor for the purposes of obtaining information that falls within the required disclosure provisions of Rule 15.1.") The State, however, is generally not deemed responsible for disclosure of information and material held by federal law enforcement agencies, *see State v. Briggs,* 112 Ariz. 379, 383, 542 P.2d 804, 808 (1975), nor crime victims, *see State v. Piper,* 113 Ariz. 390, 555 P.2d 636 (1976), nor other lay witnesses, *see* State *v. Reinhardt,* 190 Ariz. 579, 951 P.2d 454 (1997) (citing *State v. Kevil,* 111 Ariz. 240, 527 P.2d 285 (1974)). A witness's cooperation with the State does not make the witness an "agent" of the State for purposes of discovery. *Reinhardt, supra* (citing *State v. Kevil,* 111 Ariz. 240, 243, 527 P.2d 285, 288 (1974)).

The State has an obligation to disclose material information not in its possession or under its control only if (1) the State has better access to the information; (2) the defense shows that it has made a good faith effort to obtain the information without success; and (3) the information has been specifically requested by the defendant. *State v. Armstrong,* 208 Ariz. 345,

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356-357, 93 P.3d 1061, 1072-1073 (2004) (citing *State v. Reinhardt, supra,* at 585-586). "Generally, the State does not have an affirmative duty to seek out and gain possession of potentially exculpatory evidence." *State v. Rivera,* 152 Ariz. 507, 511, 733 P.2d 1090, 1094 (1987).

B. Defendant's Disclosure Obligations

Rule 15.2, Ariz. R. Crim. P., generally governs a defendant's disclosure in criminal cases. Rule 15.2(c) requires the defense to provide to the State "[a] list of all papers, documents, photographs and other tangible objects that the defendant intends to use at trial" . . . "simultaneously with the notice of defenses submitted under Rule 15.2(b)." Following this initial disclosure, both parties have a continuing duty to "make additional disclosure, seasonably, whenever new or different information subject to disclosure is discovered." *Rule 15.6(a), Ariz. R. Crim. P.*

C. The principle of the disclosure rule is the avoidance of undue delay or surprise.

The rules require both the State and the defense to make timely discovery to allow both sides to investigate and prepare cases for trial or plea agreement. "The underlying principle of our disclosure rules is the avoidance of undue delay or surprise." *State v. Rienhardt, supra* at 486, 951 P.2d at 461.

> Rule 15 is part of a comprehensive system of criminal discovery procedures promulgated to provide defendants with adequate means to discover material evidence and to provide notification to each side of the other's case-in-chief so as to avoid unnecessary delay and surprise at trial.

Carpenter v. Superior Court, 176 Ariz. 486, 488, 862 P.2d 246, 248 (App. 1993), citing *State v. Stewart,* 139 Ariz. 50, 59, 676 P.2d 1108, 1117 (1984); *State v. Clark,* 126 Ariz. 428, 432, 616 P.2d 888, 892 (1980), *cert. denied, Clark v. Arizona,* 449 U.S. 1067 (1980).

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The discovery procedures set forth in Rule 15 are "'designed to enhance the search for truth in the criminal trial by insuring both the defendant and the State ample opportunity to investigate certain facts crucial to the determination of guilt or innocence.'" *State v. Lawrence,* 112 Ariz. 20, 22-23, 536 P.2d 1038, 1040-1041 (1975) (quoting *Wardius v. Oregon,* 412 U.S. 470, 474, 93 S.Ct. 2208, 2211, 37 L.Ed.2d 82 (1973)). "The rule, to be effective, must be applied with equal force to both the prosecution and the defendant." *Lawrence, Id.* Discovery is a "two-way street." *Wardius v. Oregon,* 412 U.S. 470, 475, 93 S.Ct. 2208, 2212, 3 L.Ed.2d 82 (1973).

C. State's Motion to Compel disclosure of Civil Lawsuits

On March 24, 2011, the State moved this Court for an order compelling Defendant to disclose all pleadings and all discovery, including requests for admissions (and Defendant's answers thereto), interrogatories (and Defendant's answers thereto) and depositions, for all lawsuits filed against Defendant, James Arthur Ray, and/or James Ray International arising out of Spiritual Warrior 2009. The motion was made pursuant to Rule 15.2(g), Ariz. R. Crim. P. Based on Defendant's introduction of the content of the complaint filed by Ms. Gennari, the State requires this information to properly prepare for trial testimony and the information is readily available to Defendant as a party to the lawsuits.

III. Argument

A. Claims that have been settled by Defendant are clearly not exculpatory.

The State agrees that the fact that a witness has filed a lawsuit against a defendant is relevant to a witness's motive or bias. However, if a lawsuit is not pending there is no economic motive with which a party might impeach a witness's testimony. As explained above, Mr. Li represented to the State on December 17, 2010 that the lawsuits filed by the victims' family have

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been settled. The State was also aware that Defendant had settled the claims with the other plaintiffs. Mr. Li did not inform the State that a lawsuit had been filed by Laurie Gennari just three months earlier and that the lawsuit had not been settled.

B. Defendant's settlement of claims prior to trial is admissible as evidence of a witness's bias when testifying.

Rule 408, Ariz. R. Evid., allows the introduction of settlements to prove a witness's bias or prejudice. The logical inference to draw from the fact that Defendant settled the lawsuits and claims prior to trial is that he attempted to "buy" the witnesses' silence. In fact, at Defendant's insistence, each of the settlements contains a confidentiality agreement. To this end, the State believes that the fact that the claims and lawsuits were settled by Defendant should be admitted pursuant to Rule 408.

C. The State accurately explained to Court its level of knowledge of lawsuits.

Defendant takes out of context excerpts from the trial transcript, suggesting the State has misrepresented to the Court its level of knowledge about the various lawsuits. As explained above, the State knew generally that lawsuits and claims had been filed and settled by Defendant. The State **did not** know of the lawsuit filed by Laurie Gennari until it was raised in court on March 22, 2011. The State accurately represented its level of knowledge to this Court.

Not included in the portion of the transcript reprinted by Defendant on page three of Defendant's Motion are the following two discussions wherein the State informed the Court of its knowledge generally that lawsuits had been filed:

> THE COURT: Let me ask you in that regard. You don't – you're saying you had no idea there were lawsuits, is that what you are saying. You had no idea there were lawsuits.
>
> MS. POLK: ***The State knows there are lawsuits filed.***

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Q: You think that would come under a disclosure obligation to have to say that or are you relying on the fact the defense must have known that also. Because it would seem the cases indicate the fact that a lawsuit is filed, that is something that goes to motive or bias. Isn't that something the State would normally disclose under *Kyle Brady* principles?

MS. POLK: Your Honor, not necessarily. But these witnesses have been interviewed. The defense is the one that attempted to ask them about lawsuits. Even though their client is a party to the lawsuits. Your Honor, these are lawsuit that their client is a party to.

THE COURT: So you're saying you would not have to disclose that because they would have had to have known it.

MS. POLK: Yes.

Draft Trial Transcript, 3/22/11 at 99: lines 21 -25; 100: lines 1-20 (emphasis added).

A brief time later, the State reiterated it had a general knowledge that lawsuits had been filed:

THE COURT: So you're saying you did not know there were lawsuits filed, because if you did know then it was in your possession it seems to me.

MS. POLK: ***Your Honor, the state is aware that lawsuits were filed*** and mostly we learned about it through the defense interviews of witnesses when the defendant started asking witnesses about lawsuits and kind of probing well, there is a confidentiality agreement trying to get witnesses to talk about the terms and so that's how we learned about it. Secondly, the Brady obligation applies to documents that are in our possession. They've never been in our possession and thirdly, their client is a party to those lawsuits. Even if somehow the court decided the state had a Brady obligation to go out and actively find lawsuits.

THE COURT: And I didn't say that Ms. Polk. I'm saying if you already knew though you had the information. I agree no, you don't have to go out and investigate. I don't agree with that proposition. I'll tell you that right now. I don't agree that the state has to go out and explore every possibility. But when you have information possess that, then that question doesn't even arise.

MS. POLK: Yes and then the next step is under rule 15.2 If you intend to use these documents at trial you have to disclose them. Period. You have to disclose them.

Draft Trial Transcript, 3/22/2011, at 99: lines 21 -25; 100: lines 1-20.

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D. The information Defendant seeks is not within the State's possession or control.

Defendant argues that the State has an obligation to seek out and obtain exculpatory information that extends far beyond the plain language of Rule 15.1(f), Ariz. R. Crim., which states:

> The prosecutor's obligation under this rule extends to material and information in the possession or control of any of the following:
>
> (1) The prosecutor, or members of the prosecutor's staff, or,
>
> (2) Any law enforcement agency which has participated in the investigation of the case and that is under the prosecutor's direction or control, or,
>
> (3) Any other person who has participated in the investigation or evaluation of the case and who his under the prosecutor's direction or control.

Defendant's argument is not supported by the cases cited in his motion. Instead, the cases reinforce the State's position that it had no obligation to research, obtain and provide to Defendant evidence of civil lawsuits filed against him by the State's witnesses or to seek out and provide possible impeachment information relating to Rick Ross.[1]

Defendant cites to *United States v. Price,* 566 F.3d 900, 919 (9th Cir. 2009), in support of its claim that the State is "fundamentally incorrect" in its interpretation of Rule 15. 1. *Price* involved a prosecutor who requested the investigating detective to run a criminal history check on a key state witness, but failed to learn the results of the check. The witness in fact had a criminal history that would have allowed the defendant to impeach her testimony. Clearly under these circumstances and under the parameters set forth in Rule 15.1(f), the investigating detective was under the control of the prosecutor.

[1] The State does not dispute that it has a duty to disclose any felony convictions of the State's witnesses. Mr. Ross's prior felony convictions were timely disclosed to Defendant.

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Defendant further cites to *United States v. Hamilton,* 107 F.3d 499, 509 (7th Cir. 1997). But *Hamilton,* like *Price,* also supports the State's position. In *Hamilton,* a bank teller in a robbery testified he had written down a description of the robber's features immediately after the crime and given the description to a police officer. This alleged description had never been disclosed. The prosecutor in the case maintained he had never received the document from the police. He further indicated he had checked with the police and no one could find a copy of the description. The Court found no error occurred. Noting that defendant's argument presupposes the bank teller's written description would have been exculpatory, an assertion the court found was "at best uncertain," the Court stated "a *Brady* violation does not arise due to nothing more than a possibility that the undisclosed item might have helped the defense...." *Id.* at 510, citing *United States v. Agurs,* 427 U.S. 97, 109-110, 96 S.Ct.2392, 2400-2401 (1976).

Although the facts in *Hamilton* indicated the description may not have been given to the police at all, the case involved the investigating agency, which is an agency that Rule 15.1(f) clearly defines as under the State's control. The court in *Hamilton* rejected the defendant's argument that the "government's *Brady* obligations include the duty to search its sources for exculpatory information and turn the information over to the defense." *Id.* at 509-510. Instead, the court found that "[t]he government will not be found to have suppressed information if that information was available to the defense through the exercise of reasonable diligence." *Id.* at 510.

The cases cited by Defendant to support his argument regarding constructive possession similarly support the State's position. For example, in *United States v. Reyeros,* 537 F.3d 270, 281-282 (3rd Cir. 2008), the court rejected the defendants' argument that the United States government was "obligated to obtain and produce documents that the government had never seen and that were in the possession of a foreign sovereign." *Id.* at 279. Specifically the court held:

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> More importantly, though, we could not conclude that the prosecution had constructive possession of the requested documents in this case even if it could have acquired them. The mere fact that documents may be obtainable is insufficient to establish constructive possession. ***Without a showing that evidence is possessed by people engaged in the investigation or prosecution of the case, we have declined to hold that the evidence was constructively possessed by federal prosecutors,*** despite its being in the possession of another agent of the federal government and therefore presumably obtainable.

Id. at 284 (emphasis added).

Defendant cites *United States v. Joseph,* 996 F.2d 36 (3rd Cir. 1997), yet another case that does not support Defendant's argument relating to constructive possession. *Joseph* involved information relating to the State's witnesses that was in the prosecutor's own files in an unrelated case. The information had possible impeachment value and was never disclosed to the defendants. Even though the information was clearly in the prosecutor's possession and control, on review the court found no error. Instead, the court noted the defendants had never made a request for the specific information at issue and stated, "We will not interpret *Brady* to require prosecutors to search their unrelated files to exclude the possibility, however remote, that they contain exculpatory information." *Id.* at 41.

Defendant's broad interpretation of the State's disclosure obligation is not supported by Rule 15.1 or the cases cited in Defendant's motion. The State has no obligation to seek out exculpatory information for the Defendant that is outside of its possession and control as defined in Rule 15.1(f).

E. Rule 15.2(c)(3), Ariz. R. Crim. P. is not limited to evidence Defendant will use in its case-in-chief.

Rule 15.2(c)(3), Ariz. R. Crim. P., requires a defendant to disclose to the State "[a] list of all papers, documents, photographs and other tangible objects that the defendant ***intends to use at trial.***" (emphasis added) Defendant claims the rule applies only to evidence he intends to introduce during his case-in-chief and does not apply to evidence he will use during cross-examination of the State's witnesses. There is nothing in the plain language set forth above that

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supports this interpretation. The comment to the rule stating that the disclosure is "***limited to evidence which the defendant will offer at trial***" does not support an interpretation that the defendant's disclosure obligation only applies to materials introduced in a defendant's case-in-chief.

> As noted by Defendant in his motion:
>
> [T]he comment to Rule 15.2(b), reflecting principles that extend to all of the defendant's disclosure obligations, notes that the rule "***is limited to matters as to which the defendant will introduce evidence***." Comment to Ariz. R. Crim. Proc. 15.2(b). 'The limitation is designed to allow the defendant to argue deficiencies in the state's case (***not requiring the presentation of defense evidence***) without prior warning, and to make his disclosure obligations sufficiently clear and predictable."

Defendant's Motion to Compel Disclosure of Brady Material at 9 (emphasis added). Rule 16(b)(A) of the Federal Rules of Criminal Procedure governs a defendant's disclosure obligations and explicitly limits the scope of disclosure to items a defendant intends to use his case-in-chief at trial. The Arizona rule contains no such limiting language.

It is clear from the plain language of the rule and the comments to both Rule 15.2(b) and Rule 15.2(c)(3) that Defendant's disclosure obligation extends to all evidence the Defendant intends to introduce at trial whether introduced during Defendant's case-in-chief or in his cross-examination of the State's witnesses.

> Although a comment may clarify a rule's ambiguous language, a comment cannot otherwise alter the clear text of a rule. *Cf. Janson v. Christensen,* 167 Ariz. 470, 471, 808 P.2d 1222k, 1223 (1991) (stating that "we follow fundamental principles of statutory construction, the cornerstone of which is the rule that the best and most reliable index of a statute's meaning is its language and, when the language is clear and unequivocal, it is determinative of the statute's construction.")

State v. Aguilar, 209 Ariz. 40, 48, 97 P.2d 865, 873 (2004)

Defendant claims the lawsuits filed against Defendant are being used solely for impeachment and are not intended to be moved into evidence; therefore, advance disclosure is not

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required. If this was an accurate representation of what is occurring at trial, the State would agree with Defendant. However, with regard to Ms. Gennari, Defendant read into the record extensive excerpts from the complaint filed against Defendant. This approach necessitated the State doing the same and the complaint was ultimately admitted by the stipulation of the parties. As noted in the comment to Rule 15.2(b) cited above, the limitation is designed to allow the defendant to argue deficiencies in the state's case (***not requiring the presentation of defense evidence***) without prior warning. Pursuant to Rule 15.2(c)(3), Ariz. R. Crim. P., the State is entitled to advance notice of the evidence that will be presented either orally through the reading of a civil complaint or through the admission of the complaint during trial.

F. The information requested by Defendant has either been disclosed, is not subject to disclosure, or is not in the possession and control of the State as defined in Rule 15.1(f).

The State has disclosed all material in its possession or control bearing on the bias or credibility of its witnesses. The State has disclosed the prior convictions of State's witness Rick Ross. The State has previously informed Defendant that it does not have information in its possession or control relating to any other possible impeachment evidence relating to Mr. Ross. Moreover, the State has made Mr. Ross available for an interview. It is clear from Defendant's questioning of Mr. Ross that Defendant has in his possession the information he is insisting the State has a duty to seek out and disclose. The State has no greater access to this information than Defendant. Finally, Defendant cites no authority that requires the State to disclose "[a]ll communications, whether written or oral, between the prosecution and the civil attorneys for the government witnesses in their complaints against Mr. Ray." The State has received some communications from civil attorneys containing materials it has found to be subject to disclosure and has in fact made disclosure of these communications. (See State's 12th Supplemental

Disclosure, "Statement Under Oath of Sandra Andretti," Bates No. 5238-5375; State's 30th Supplemental Disclosure, "Shore v. Ray Family Damages Summary," Bates No.6758-6858; and State's 41st Supplemental Disclosure, "Liz Neuman's Biographical Data," Bates No. 7784-7787.)

IV. Conclusion

The Defendant claims the State has an obligation to seek out and disclose exculpatory evidence that is not under the State's possession or control as defined in Rule 15.1(f), Ariz. R. Crim. P. Arizona law and the cases cited by Defendant do not support Defendant's interpretation. The State has reviewed the evidence in its possession and has disclosed to the defense anything that is arguably exculpatory. Should any additional materials in information come into the State's possession or control, the State will timely disclose. Accordingly, the State respectfully requests this Court deny Defendant's Motion to Compel Disclosure of Brady Material.

RESPECTFULLY submitted this 4th day of April, 2011.

By Sheila Sullivan Polk
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COPIES of the foregoing delivered this 4th day of April, 2011, to

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